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Top Ten Things Your Board Needs to Know About Effective Compliance and Ethics Programs

“Any rational person attempting in good faith to meet an organizational governance responsibility would be bound to take into account [the US Sentencing Guidelines]...” stated the Delaware Court of Chancery in the landmark Caremark case. And your company’s board of directors (Board) needs to understand this given the Guidelines charge them with oversight and participation in corporate compliance programs. As in-house counsel you should understand these requirements as well and make sure your Board is aware of them.

Make no mistake however---this isn’t just about criminal misconduct and sentencing. Rather, whether an organization has an effective compliance and ethics program (Program) that meets the Guidelines is an important consideration utilized by the Department of Justice, the SEC, and other regulators to determine whether or what type of action should be taken for corporate misconduct.

Here is what your Board needs to know about what the Guidelines require.

1. The Board Needs to Know About and Oversee the Program

The Board is charged with being knowledgeable about the content and operation of the Program, and reasonably overseeing its implementation and effectiveness. Basic information should be made available to the Board about its responsibility for the Program. Regular reports should be supplied about the Program’s operations, resources and effectiveness.

2. There Must Be An Appropriate “Tone at the Top”

The company must have an organizational culture that encourages ethical conduct and commitment to compliance with the law by establishing an appropriate “tone at the top.” A paper program just won’t do it. Companies must not only “talk the talk” but “walk the walk.” Establishing this culture begins with the Board. It also requires making sure that corporate leaders behave appropriately or are held accountable by the Board.

3. Individuals Responsible for the Program Must Have Effective Authority and Access

“High level” corporate personnel (i.e., those who have “substantial control over the [company] or who have a substantial role in making policy”) should be assigned overall responsibility for the Program. Otherwise it is likely to undercut the Program and the establishment of an appropriate “tone at the top.” Lower level individuals in the company may be delegated day-to-day operational responsibility for the Program, but should have access to the Board or the subgroup responsible for oversight of the Program (e.g., Audit Committee).

4. The Program Must Have Adequate Resources

What is adequate? Resources should be sufficient to reasonably prevent and detect misconduct and promote an organizational culture that encourages a commitment to compliance with the law. Factors which might be considered in determining resource adequacy could include: (a) size of the company (by number of employees or assets); (b) whether the company is highly regulated; (c) complexity of the company's transactions; (d) geographic range (i.e., local v. international); (e) benchmarks in the industry; (f) nature of the company's activities; or (g) potential areas of significant risk/liability and the need to address them.

5. The Company Must Adopt Compliance Standards and Procedures

An employee code of conduct is essential. Required standards common to all companies address such matters as conflicts of interests, entertainment and gifts, prohibition against insider trading, and non-compliance reporting mechanisms. Other compliance standards are tailored to the nature of the company's business activities such as antitrust, the Foreign Corrupt Practices Act, or reports related to government contracting, Sarbanes-Oxley requirements such as up-the-ladder reporting for attorneys under section 307 should also be addressed. Finally, standards peculiar to the job duties of particular employees (e.g., those handling hazardous wastes) should be included.

6. Companies Need to Have Effective Compliance Training Programs and the Board Should Participate

The Guidelines require that companies have effective training programs that communicate their compliance standards and procedures to the Board, all levels of employees, and the company's agents if appropriate. The purpose of the training is not just to educate employees about the compliance requirements, but also to motivate them to comply with them. Training should be tailored; there is no template. Small organizations could provide training at orientation, staff meetings, or even one on one. Larger companies should have a formally documented program with sufficient dedicated resources and tools to measure its effectiveness.

7. The Program Should Be Regularly Evaluated

Programs should not stagnate. They should be evaluated regularly and appropriately modified. This analysis may be internal (review by internal audit, self assessment, employee surveys, etc.), but periodic measurement by an outside third party is highly recommended. Evaluations of the program should take into consideration new business activities and updated corporate risk assessments.

8. The Approach to Compliance Should Be Both Carrot and Stick.

The Program should be promoted consistently within the company with incentives provided for compliance with the Program and disincentives provided for engaging in misconduct. For example, whether managers participate in the Program (e.g. take training), properly administer compliance activities in their department, and set an example that contributes to the appropriate "tone at the top," should be considered in their performance evaluation and resulting compensation. Similarly, misconduct should be met with appropriate sanctions regardless of corporate position.

9. Company "Hotlines" with Anonymity Features Are Required

The Guidelines also require the implementation of a mechanism that allows employees to anonymously report potential misconduct without fear of retaliation. For those companies that operate outside the United States, special care should be taken in addressing this requirement. The availability of the hotline needs to be communicated to employees. Evaluation of the hotline should be part of the regular assessment of the Program.

10. Risk Assessment Drives the Program

The elements of a company's Program will be driven by an analysis of the laws and regulations applicable to the operations of the company and the risks potential non-compliance creates. Periodically the company must reassess this risk and modify the Program accordingly.

Additional Resources

Text of the Federal Sentencing Guidelines for Organizations

http://www.ussc.gov/2005guid/8b2_1.htm

Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines (October 7, 2003) <http://www.ussc.gov/corp/advgrprpt/advgrprpt.htm>